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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1421

LAHMAN MANUFACTURING COMPANY, INC. and ROBERT ANDERSON, d/b/a PLATTE IMPLEMENT,
Petitioners,

vs.

FARMHAND, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Farmhand, Inc., denies that a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on January 11, 1978.

A SUPPLEMENTAL STATEMENT OF THE CASE

Farmhand, Inc., is dissatisfied with Petitioners'[1] Statement of the Case.

Lahman correctly notes that the counterclaim for antitrust violations and the third-party complaint against Schiltz were severed (P. 3).[2] However, upon motion for summary judgment by Farmhand and Schiltz, these claims were dismissed with prejudice; and their dismissal was not appealed.

As admitted by Lahman's own expert on cross-examination, the Schiltz invention was the first chain-type haystack mover.

Prior to the Schiltz invention, the art of haystack moving relied exclusively, since 1897, on what is now called the cable-type mover. While advances were made in the cable-type mover over the years, Lahman could point to no successful variation on the cable-theme prior to the Schiltz invention. Prior attempts of would-be inventors, such as Sutton and Kopecky, to automate haystack moving had met with failure.

The Schiltz invention automated haystack moving. The operator does not need to leave the cab of his truck or trailer in loading, transporting or unloading the haystack. It was the first haystack mover capable of accomplishing this result.

The trial court found that when compared to the chain-type mover, operation of the cable-type mover is relatively difficult.

> The evidence presented at trial demonstrated numerous shortcomings in the cable-type movers. Many of the required operations are manual and require the operator

[1] Hereinafter referred to as "Lahman".
[2] The designation P. refers to the Petition, the designation A refers to the Appendix printed with the Petition.

> to leave his conveyance. This can be especially burdensome in inclement weather. The sling, which must be manually positioned, can weigh anywhere from 40 to 150 pounds. Further, in normal operations, the sling can act to slice off the bottom portion of a haystack, leaving part of it in the field. To counter this result, testimony showed that the operator must sometimes stand on the sling to keep it in a lower position. This gives rise to definite safety hazards. Another drawback of this type of mover are the cables themselves. The cables can sliver and have been known to snap under tension. This also presents a definite safety hazard. (A 12-13).

Contrary to Bruce (a paper patent available to the public since 1927 and still not a contribution), the Schiltz invention, by Lahman's own testimony, was a significant advance in the haystack moving art. Mr. Lahman testified:

> Q. Would it be correct to say that the chain-type mover has been a significant advance in the haystack moving art?
>
> A. Yes.
>
> Q. And it is quite fantasic, is it true, to be able to move one of these haystacks without cables?
>
> A. It sure is.

Lahman's attempt to compare the structure of the Bruce patent to Schiltz (P. 6-7) is factually unsupported and is erroneous. The Bruce patent issued in 1927. Lahman's own expert admitted that for at least 25 years Bruce didn't contribute anything to the haystack moving art. The trial court specifically found that the Bruce patent addresses a fertilizer or straw spreader which may be pushed into a pile of this ma-

terial to withdraw a certain amount for spreading (A 26-27). The fact that Bruce lacks at least elements (d) and (h) of claim 10 of the Schiltz invention should at this point be undisputed. This is a factual finding of the trial court (A 27, see A 23) affirmed on appeal.

The trial record in this case is voluminous. The case was at trial eighteen days. Thorough pretrial and post-trial briefs were filed by both parties. The trial court made a very thorough and well considered memorandum opinion. The questions before the trial court were essentially factual. On appeal, the Eighth Circuit was satisfied that the findings of the trial court were adequately supported by the evidence.

ARGUMENT

1. No Federal Question Presented.

The questions presented for review by Lahman are not within the provisions of Rule 19 of this Court. Indeed, the primary authority relied on by Lahman for review is *Roanwell Corp. v. Plantronics, Inc.*, 429 U.S. 1004 (1976) in which the petition for writ of certiorari was denied. Granting of the Petition would be an invitation to inundate this Court with review of all patent cases. The Petition should be denied.

2. Petitioners' First Question.

This question is premised upon an erroneous conclusion and error of fact. Lahman's statements that the Bruce structure responds to each element of Claim 10 of the Schiltz patent and implication that the function of the Bruce structure and the Schiltz patent are the same are factually incorrect.

The trial court specifically found that Defendants had conceded that Bruce lacks element (d) of claim 10 of the patent in suit (A 23). In addition to lacking this element, the trial court also found that Bruce lacked element (h) of claim 10 of the Schiltz invention (A 27). Further, the trial court specifically found that Defendants had failed to introduce evidence to show that the Bruce patent could be made to perform substantially the same function as the Schiltz invention in substantially the same way, either as the patent reads or with the addition of changes requiring only ordinary skill (A 23).

Lahman quotes some of their expert's testimony under cross-examination with respect to element (h) of claim 10 (P. 8); however, Lahman leaves out two very important statements by Mr. Wolfe.

> Q. At least you will agree with me that as far as describing any desired timing relationship between the movement of the chains and the movement of the vehicle, Bruce does not describe this?
>
> A. That's right, . . .
>
> Q. And we read through this patent (Bruce) from beginning to end, am I correct, that no place does this patent suggest to us to drive the chains 30 at a speed generally equal to the movement of the machine?
>
> A. There is nothing in the printed material.

The Eighth Circuit was not in error in affirming the findings of fact of the trial court.

Lahman's argument that litigants in the Eighth Circuit are denied the benefit of the prior decisions of this Court on the issue of synergism, in view of the decision in this case, is wholly unsupported and it is an erroneous conclusion.

In *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273 (1976), the district court, following the basic factual inquiries required by *Graham v. John Deere*, 385 U.S. 1 (1966), found the invention to be obvious; on appeal, it was held that the facts at trial did not support the finding of obviousness. This Court disagreed and held that the Court of Appeals had erroneously set aside the district court's findings.

Although in *Ag Pro, supra*, a different conclusion of obviousness was reached than that reached by the trial court here, the difference is not the result of a difference in application of the law, but a difference in the underlying facts; and Lahman does not, and cannot, attack the underlying factual findings of the trial court relating to the issue of obviousness.

A comparison of the facts in *Ag Pro, supra*, [along with the facts in the *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147 (1950) and *Anderson's-Black Rock Inc. v. Pavement Salvage Co.*, 396 U.S. 57 (1969)] with the facts in this case would only serve to further illustrate the fact that the Schiltz invention is valid.

In *A & P*, the alleged invention was simply a merchandise countertop, having side guard rails in combination with a three-sided rack for pulling the groceries along the countertop. The Court specifically found that the countertop with guide rails did exactly what it had always been doing—supporting merchandise at a convenient height and preventing the merchandise from falling off of the counter, and that the three-sided rack did exactly what it had always done—moved merchandise put within it from one place to another. Accordingly, the combination of these elements was a mere aggregation and not a patentable combination. The individual parts functioned as they always had, and by putting them in combination, a new result was not accomplished.

In *Anderson's-Black Rock*, the alleged invention was the use of a radiant-heat burner in combination with the apparatus which is used for bonding blacktop laid in strips in a roadway. The apparatus used in the bonding operation was exactly the apparatus which had previously been used and had performed the same function. In the case of the radiant-heat burner, the Court held that the radiant-heat burner by itself was not patentable and burners had already been used for the purpose of patching asphalt. Accordingly, the combining of these elements was a mere aggregation producing a result which the individual parts had already produced by themselves.

In the *Ag Pro* case, the elements of the combination are primarily functional units of a dairy operation. The claim included a barn with specific areas such as the main floor area with stalls having floors specifically described, a holding area, a feeding area and a milking area; in other words, a particular and previously well-known type of dairy barn with milking facilities. The patent claim further included a specific method of flushing manure, etc. from the barn floor surfaces by a tank on a mounting so that the tank could be tilted to send water cascading as a sheet over the floor of the milking area. As the Court found, all these elements were old **and well known in the dairy business.** The elements were capable of functioning independently; and the result achieved by the combination was merely the sum of the functional results of each element. For example, the cleaning element does not influence the operation of the milking unit so as to milk the cows in a new way.

Unlike *Ag Pro, A & P* and *Anderson's-Black Rock*, the patentable Schiltz combination is not drawn to a combination of independently functional elements; but rather, the elements of the Schiltz haystack mover cooperate with and enhance the

performance of other elements of the combination. The patent claim is to a machine for moving haystacks in a particular manner and with particular advantageous results different from any prior art haystack moving device. Unlike *Ag Pro*, all of the individual elements of the Schlitz combination were not old and well known in **the haystack moving business**. In the Schiltz invention, the individual parts function together to provide a result never before accomplished; namely **the automatic loading of a haystack**. In accomplishing this result, the parts function in a manner unlike their usual manner. This is the difference between a mere "aggregation" and a patentable combination. It might be helpful to turn to some of the specific facts which support the fact that the Schiltz combination is a new combination of elements producing a new result.

Chains or conveyors have normally been used in the past to move an object relative to the ground, either horizontally or up a ramp, for example, as objects might move along an assembly line. Chains have never previously (i.e. prior to the invention) been known to be used for loading a haystack, which is a large, heavy, flexible mass. Chains, prior to the invention, were not known to be used to provide a path for the longitudinally extending beams to easily move under the haystack between the chains and the ground. The chains, in the Schiltz invention, as they come around the ends of the beams serve a pick-up function which aid in both picking up the haystack and also in providing the path for the beams to work under the haystack between the chains and the ground. There is a cooperative and new relationship between the chains, the longitudinally extending support beams, and the speed relationship, previously not known and not disclosed in the prior art (see A 11).

In the Schiltz invention, the chains function as a primary support for the haystack. Obviously, the chains could not serve as a primary support without the cooperative support of the underlying longitudinally extending support beams. In the past, it was the longitudinally extending support beams, as in the prior art cable movers, which were the primary support for the haystack. There was no intervening element, i.e. the chains, between the bottom of the haystack and the support beams. Thus, in the prior art there was a sliding frictional relationship between the bottom of the haystack and the support beams. Now, in the invention, there is a new cooperative relationship wherein it is the chains which are the primary support for the haystack and these chains remain relatively fixed, with respect to the haystack, as the chains are fed or laid out underneath the haystack between the bottom of the haystack and the beams. A further new and cooperative relationship is the relative speed relationship between the chains moving forward and the haystack mover moving rearwardly. When this speed relationship is generally equal, the chains remain relatively fixed with respect to the bottom of the haystack as the mover moves rearwardly underneath the haystack. Thus, there is effected this new result of providing a primary support for the haystack which remains relatively fixed with respect to the haystack as the haystack is loaded. This concept is a little difficult to fully understand. This is perhaps reflected in the trial court's comment when it stated:

> Well, what I can't understand is, how can it be a moving chain all the way around, then?

An analogy might be made to a canoeist paddling upstream at a rate of three miles per hour in a river with a current of about three miles per hour. That paddler going against the

current is not going to move relative to the river bank. If he would turn the canoe around, he could travel with the current at a rate, relative to the ground, of six miles per hour.

Because of the aforementioned cooperative relationship between the chains, the beams, and the speed relationship, the sum of the parts is greater than what could be accomplished by either operating alone. For example, the longitudinally extending support beams alone cannot load a haystack; this is proven by the prior art cable mover. Similarly, it is quite obvious that the chains alone cannot load a haystack. Similarly, the chains and beams without the proper speed relationship could not load a haystack successfully and without disarrangement. It is important that the haystack be loaded without disarrangement.

That there is a new result accomplished by the Schiltz invention is undisputed. This is the **first** automatic haystack mover. Thus, in the Schiltz invention, which distinguishes it from the patent in the *Ag Pro* case, the parts cooperate to function in a manner unlike the manner they have previously functioned to perform a new result that had not previously been performed. Therefore, the Schiltz invention is not an aggregation; it is an ingenious and patentable combination.

That the result of the Schiltz invention is "unusual" or "surprising" was admitted by Lahman himself when he admitted that the chain-type mover had "revolutionized" haymoving over the old cable-type movers.

It is clear that the trial court was well aware of, and followed, the law as expressed in *Sakraida v. Ag Pro, Inc., supra,* and the similar prior cases of *A & P, supra,* and *Anderson's-Black Rock, supra.* These cases do not modify or supersede the factual inquiry required by *Graham, supra.*

In support of its erroneous argument that the Eighth Circuit has ignored the test of synergism, Lahman comments on the recent case of *Clark Equipment Co. v. Keller,* —— F.2d —— (8th Cir. 1978) (P. 10-11). The Eighth Circuit did not chastise Clark (see P. 10); did not rationalize the decision of the District Court as contended by Lahman (P. 11); and did not find no wisdom in the use of a synergism analysis (P. 11). Rather, Clark had alleged error relating to synergism on two points: that a synergism analysis was required and that the district court failed to meet this requirement (A 75). On these two points, the Eighth Circuit did not address the question of whether a synergism analysis was mandatory on the facts because the district court **had given** adequate consideration to the effect of the combination of elements in the '503 patent (A 75). Indeed, the Eighth Circuit found that "A careful reading of the District Court's opinion reveals that determinations of the novelty and unexpectedness of the combinative effect of the elements of the '503 patent underlie the District Court's entire analysis of obviousness under Section 103."; and that "Form would triumph over substance were we to hold this analysis inadequate for lack of specific reference to synergism, particularly in view of Clark's failure to place the issue of synergistic effect into issue prior to or during trial." (A 76).

The conclusion of validity in the instant case as compared to invalidity in *Ag Pro, Inc., supra,* is the result of a difference in facts not in law. The combination in suit does produce a new and unusual result in being the **first** automatic haystack mover; and the trial court so found. More importantly, Lahman has completely failed to show by evidence at trial that the result and function of plaintiff's invention was old in the prior art. As the trial court specifically found (192 USPQ 762):

Defendants have been unable to show any prior successful attempt to automate the haystack mover.

Lahman in its Petition is merely attempting to bootstrap itself to a different conclusion than that of the trial court by starting from a different and erroneous factual base not supported by the facts as found by the trial court.

3. Petitioners' Second Question

Petitioners' second question is not understood. If it is Lahman's argument that the trial court ignored the requirement of 35 U.S.C. §102 and only applied 35 U.S.C. §103, it is clear from the trial court's decision that it fully considered the requirements of 35 U.S.C. §102 and specifically considered the issue of whether or not the Bruce patent anticipated the Schiltz patent. Lahman's position on this question is also obscure in view of the trial court's finding that the invention in suit was not obvious over Bruce under 35 U.S.C. §103. If the invention in suit is not obvious over Bruce under 35 U.S.C. §103 (which is not disputed at this point by Lahman), it is not possible to find anticipation under 35 U.S.C. §102. It is also difficult to comprehend Lahman's argument that the trial court required an absolute "strict identity" test for §102 in view of the fact that the trial court found that the Bruce patent could not be made to perform substantially the same way as Schiltz, either as the patent reads or with the addition of changes requiring only ordinary mechanical skill (A-23, emphasis added).

In any event, this question of anticipation was one before the Eighth Circuit. The Eighth Circuit fully considered Lahman's argument; and it was rejected. This is not a question for the Supreme Court of the United States.

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit is in complete accord with applicable decisions of this Court and other circuit courts. Although in *Ag Pro, supra*, a different conclusion on obviousness was reached than that reached by the trial court here, affirmed by the Eighth Circuit, the different conclusion is not the result of a difference in application of the law, but in a difference in the underlying facts. Lahman cannot, and does not, attack the underlying factual findings of the trial court relating to the validity of the Schiltz patent. The petition for writ of certiorari should be denied.

Respectfully submitted,

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